

K7OHAHUC

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

18 Cr. 328 (KPF)

5 ANILESH AHUJA and JEREMY SHOR,

6 Conference

7 Defendants.

8 -----x

9 New York, N.Y.
10 July 24, 2020
11 2:05 p.m.

12 Before:

13 HON. KATHERINE POLK FAILLA,

14 District Judge

15 APPEARANCES

16 AUDREY STRAUSS

17 Acting United States Attorney for the
18 Southern District of New York

19 ANDREA GRISWOLD

20 JOSHUA NAFTALIS

21 MAX NICHOLAS

22 Assistant United States Attorneys

23 RICHARD CRAIG TARLOWE

24 ROBERTO FINZI

25 Attorneys for Defendant Ahuja

JUSTIN S. WEDDLE

JULIA CATANIA

Attorneys for Defendant Shor

K7OHAHUC

(The Court and all parties present remotely)

THE DEPUTY CLERK: Your Honor, this is in the matter of USA v. Ahuja, et al.

Counsel, please state your name for the record, beginning with the government.

MS. GRISWOLD: Good afternoon, your Honor. Andrea Griswold, Joshua Naftalis, and Max Nicholas.

THE COURT: Good afternoon. Thank you very much. Representing Mr. Ahuja?

MR. TARLOWE: Good afternoon, your Honor. It's Richard Tarlowe and Roberto Finzi on behalf of Mr. Ahuja, and Mr. Ahuja is on as well.

THE COURT: Yes, I see Mr. Ahuja. Thank you very much for participating. I see you as well. Thank you.

And representing Mr. Shor?

MR. WEDDLE: Good afternoon, your Honor. Justin Weddle for Mr. Shor from the law firm of Weddle Law. My colleague, Julia Catania, is participating by phone, and Mr. Shor is on by video.

THE COURT: Mr. Weddle, I'm assuming I am to direct my questions to you. Is that correct?

MR. WEDDLE: That's correct.

THE COURT: Mr. Tarlowe, as between you and Mr. Finzi, to whom should I be directing my questions?

MR. TARLOWE: To me, your Honor.

K7OHAHUC

1 THE COURT: All right. Thank you for letting me know.

2 Ms. Griswold, among your team, to whom should I be
3 directing my questions?

4 MS. GRISWOLD: In the first instance, to me, your
5 Honor. We may pass the baton depending on the nature of the
6 Court's inquiry.

7 THE COURT: I appreciate that. Thank you.

8 All right. May I confirm as well that there's a court
9 reporter on the line. I do believe I see her phone line.
10 Thank you.

11 All right. Because there is a court reporter, I will
12 be asking folks to be mindful of that and to be as slow as you
13 possibly can in speaking.

14 I want to begin, please, with some housekeeping
15 matters. I'm seeing, first of all, that I was unable to change
16 the name that is affiliated with my account. So you see me in
17 my -- without the full Katherine Polk Failla. You'll take no
18 offense at that.

19 It's been a while since we've seen each other, and a
20 lot has happened in the world and in this area. So I begin by
21 hoping for each of you and for your families and those that you
22 hold dear that you have been safe and well during this period
23 of pandemic, and I continue to hope that for as long as this
24 lasts.

25 I do have a couple of housekeeping matters, and then I

K7OHAHUC

1 wanted to give you my thoughts and then I wanted to hear your
2 thoughts. So I think that's one way of explaining that is to
3 say that I'm not deciding many things finally today. I just
4 want that to be clear. But I want to tell you some things that
5 I have decided and some things that I want to do going forward.

6 Please excuse me. Perhaps someone's phone is not on
7 mute because I'm hearing another conversation. All right.
8 Hopefully that will end.

9 I wanted, since this is an issue -- yes, Mr. Finzi.

10 MR. FINZI: I'm sorry, your Honor. I'm really sorry
11 to interrupt. I just noticed -- and I don't know if other
12 people are seeing this, too -- that there is a recording button
13 going on in my screen, and I haven't seen that in prior Zoom
14 calls, and I just want to make sure people are aware of it. I
15 don't necessarily have an objection to it, but it's a little
16 unusual, and I wanted to make sure that other people saw it and
17 were aware of it.

18 THE COURT: All right. Thank you.

19 It may be coming from our end. Let me ask my deputy
20 if she's aware of the recording.

21 MR. FINZI: Yes, Judge, it's our backup recording.

22 THE COURT: Mr. Finzi, it is ours.

23 MR. FINZI: I apologize, then, your Honor.

24 THE COURT: No, no, no need to apologize. It's
25 absolutely right to address this issue.

K7OHAHUC

1 I also thank my deputy for changing my name. Thank
2 you.

3 All right. This particular issue that brings us
4 together today is an issue about disclosure, and so I wanted to
5 put on the record a disclosure of my own that may or may not
6 impact the proceedings in this matter. After the trial in this
7 case, it should not surprise you to learn that I have
8 encountered some of you and had conversations with some of you
9 in other events. For example, at what I believe was a cocktail
10 party that Preet Bharara and Joon Kim may have done, I saw
11 Mr. Nicholas and spoke with him. I saw Mr. Tarlowe and spoke
12 with him.

13 About that time I understood from the trial team for
14 the government that one of their paralegals, Sarah Pyun, was
15 going to start law school. I guess it just came up in
16 conversation, what happens after this, after this trial? She's
17 going to begin law school. She was recommended to me by the
18 trial team, or by members of the trial team, as someone who
19 might do well as an intern in my chambers. And because of the
20 work that I saw her do during the trial, I did interview her
21 and I did hire her, and she is currently an intern of mine in
22 my chambers.

23 I can tell you that we've had no substantive
24 discussions about this trial. I can also tell you she has not
25 set foot in my chambers because this whole internship

K7OHAHUC

1 experience, I'm sorry to say, has been virtual. They've all
2 Zoomed in each day. But I did want to make you aware that the
3 government -- one of the paralegal specialists for the
4 government team is now my intern.

5 Separately, and somewhat related to that, in February
6 of this year, I did have lunch with Mr. Nicholas, in part to
7 thank him for the recommendation and in part to talk about
8 things that I think prosecutors think about when they're
9 thinking about maybe what lies beyond the office. Again, I
10 have had no substantive discussions about this trial. And I
11 believe, finally, that I received an email from Mr. Nicholas
12 during this period of quarantine, in or about May, just saying
13 "hi," inquiring as to how I was. I did answer it, and here too
14 there were no discussions about the trial.

15 So I wanted those of you who are representing the
16 defendants to be aware of that. To my mind, I don't think any
17 of these events, either alone or together, amounts to something
18 warranting recusal, but I figured you should be aware. You can
19 talk about it, and if you think otherwise, you'll let me know.

20 I also wanted to talk to -- I now understand
21 Mr. Weddle and Mr. Tarlowe, about the issue of my jurisdiction,
22 because I understand the case is to now be on appeal. It was
23 my belief that I could conduct these proceedings in aid of the
24 appeal and that there wasn't -- I was not somehow divested of
25 jurisdiction to have any proceedings with respect to this

K7OHAHUC

1 issue, but I wanted to make sure you had thought through these
2 issues, and I'd like to understand your thoughts.

3 Mr. Weddle, simply because you are to my left and
4 Mr. Tarlowe's to my right, may I have your thoughts on this?

5 MR. WEDDLE: Yes, your Honor. The way that I've been
6 thinking about this is that our initial request is a request
7 for court-ordered discovery and a hearing, fact-finding.

8 THE COURT: Yes.

9 MR. WEDDLE: That fact-finding is in aid of a motion
10 for -- is likely in aid of a motion for a new trial. Your
11 Honor has jurisdiction to deny a motion for a new trial
12 notwithstanding the appeal. To the extent your Honor believes
13 that there's a substantial issue presented by the motion or is
14 inclined to grant the motion, then your Honor has the power and
15 authority to make an indicative ruling to the Court of Appeals
16 to that effect, and then the Court of Appeals has the
17 discretion, if it would like to, to return jurisdiction to your
18 Honor.

19 So the way I see this playing out is that what we're
20 doing right now is we're trying to find facts. As soon as we
21 complete the process, the finding of facts, then I anticipate
22 the defense making motions. Among other requests for relief,
23 there would be a request for a new trial, at a minimum. And at
24 that point, your Honor would have it in your power to
25 essentially request jurisdiction back from the Court of

K7OHAHUC

1 Appeals, and they would have it, obviously, within their power
2 to return it to you. Absent those events taking place in that
3 way, then the appeal would, of course, go forward.

4 We are in a position right now where we have -- and
5 this is set forth in our papers, and I don't want to belabor
6 the answer to this relatively simple question -- but we're in a
7 position of having litigated fully bail pending appeal, both in
8 front of your Honor and in the Court of Appeals, and fully
9 briefed or filed our initial appellate briefs in the Court of
10 Appeals based on false facts. So we're in a situation right
11 now where, depending on how your Honor intends to rule on the
12 requests that have been made so far and depending on how the
13 schedule looks for the future in terms of resolving these
14 issues, there is, let's say, a puzzling circumstance in the
15 Court of Appeals, which is that they have before them an
16 argument that's been briefed by Mr. Shor and joined in by
17 Mr. Ahuja that is based on an incomplete and incorrect record.
18 And I would add that the government's deadline to oppose that
19 argument that's based on inaccurate facts is coming up
20 relatively soon. I believe it's August 3.

21 THE COURT: Mr. Weddle, to that point -- and certainly
22 I'll turn to Mr. Tarlowe momentarily -- but, Mr. Weddle, I had
23 the exact same thought; I had the exact same analysis. One
24 might have thought we were in the same unit at one point. But
25 what I'm wondering, and I'm just sort of wondering out loud on

K7OHAHUC

1 this, is whether it makes sense to stay the appeal. And I'm
2 not making any final -- obviously, that would be your motion to
3 make, but my concern here is, depending how long the
4 fact-finding component that you've outlined takes, I'm
5 concerned about the Second Circuit having or spending time on a
6 record that is incomplete, and I'm concerned about you writing
7 a reply brief where you're perhaps not able to put in other
8 information.

9 So I'm not telling anyone what to do. I'm exploring
10 whether it makes sense to request a stay of the appeal pending
11 resolution of what will be, in the first instance, fact-finding
12 or fact-gathering and what may be, in the second instance,
13 motion practice and hearings thereon.

14 Have you discussed that with your codefendant counsel?

15 MR. WEDDLE: I have, your Honor, and my thinking along
16 those lines is I think in line with your -- well, I don't want
17 to speak for how your Honor is thinking about things, but I had
18 gone through a similar path about considering whether it makes
19 sense to stay the appeal, and I hadn't -- we haven't reached a
20 final decision on it, and it's because there are a couple of
21 variables and moving parts here. The main thing is that we
22 believe that we have a meritorious appeal and that the
23 convictions are going to be reversed. To the extent that
24 that's correct, my client is due to surrender to serve sentence
25 in September. So if that surrender date comes and he

K7OHAHUC

1 surrenders to serve a prison sentence, then any day that the
2 appeal is extended is an extra day that he has to spend in
3 prison that he might not otherwise have to spend. So we don't
4 want to delay the appeal if it means that my client is going to
5 be in prison.

6 THE COURT: Mr. Weddle, may I pause you right there,
7 sir. I actually thought of that as well, and while I'll make
8 no final determinations because I do want to hear from
9 Mr. Tarlowe and from the government on this, if I were staying
10 the appeal, I imagine that I would stay the surrender date
11 through the conclusion of the motion practice at this end, but
12 I'll hear from you on that point.

13 MR. WEDDLE: I think that's one possibility, your
14 Honor. I think that, actually, a cleaner way to accomplish the
15 same thing is for -- in light of the changed circumstances, I
16 think the analysis of the bail pending appeal motion should be
17 changed. Indeed, we pointed out in the letters that one of the
18 sworn representations by the government submitted in opposition
19 to bail pending appeal is misleading and has not been
20 corrected, and in addition, the facts -- this was one of the
21 key arguments in the bail pending appeal motion -- but the
22 analysis of these disclosure issues and this line of argument
23 of cross-examination that relates to that is one of the issues
24 that was presented. Based on the record before the Court of
25 Appeals back in February, I think it was, or March, the Court

K7OHAHUC

1 of Appeals found no substantial issue. I think that the Court
2 of Appeals might revisit that decision, particularly if bail
3 pending appeal -- if an application to revisit that decision
4 was on consent of the government, that is, if the government
5 agreed that the facts have changed such that there is currently
6 a substantial issue presented by the appeal and so there should
7 be bail pending appeal and a stay of the appeal.

8 And then I think, depending on when your Honor would
9 prefer to do it, but I think organizationally what I would hope
10 to have happen in those circumstances is that your Honor would
11 make the indicative ruling to the Court of Appeals that there's
12 at least a substantial issue that should return jurisdiction to
13 you, and then we could all proceed in an orderly fashion.

14 THE COURT: All right. I had not thought about bail
15 pending appeal. I had thought about extending the surrender
16 date, although I saw, I believe in the most recent submission
17 from Mr. Ahuja's counsel, a concern that Mr. Ahuja had about
18 wanting some finality. I still suspect on these facts he might
19 be willing to have his surrender date extended further. But
20 let me please turn to Mr. Tarlowe and get his views. Thank you
21 very much for yours.

22 Mr. Tarlowe.

23 MR. TARLOWE: Thank you, Judge.

24 First, on the legal analysis, we agree with what
25 Mr. Weddle and what your Honor have laid out in terms of the

K7OHAHUC

1 Court's jurisdiction, and we also envision the next step as a
2 fact-finding exercise that we believe will then result in the
3 filing of motions before this Court.

4 In terms of a potential stay of the appeal, we have
5 thought about that issue, and frankly, Judge, as Mr. Weddle
6 said, I think there are a number of variables that play into
7 that, a big significant one of which is what the Court intends
8 to do in connection with our request for fact-finding. So I
9 think what we were planning to do was sort of see what happens
10 today, and then based on that confer with Mr. Weddle and with
11 the government and potentially move before the Court of Appeals
12 to stay the appeal. Perhaps there would be a joint motion to
13 stay the appeal, but we wanted to have a better sense, first,
14 of what the Court intends to do.

15 THE COURT: OK. I appreciate that.

16 Ms. Griswold, the government's position?

17 MS. GRISWOLD: We agree with the legal framework in
18 terms of your Honor's ability to conduct fact-finding and
19 consider any potential motion under Federal Rule of Criminal
20 Procedure 37.

21 In terms of the questions about staying the surrender
22 date and whether or not we would consent to revisit the bail
23 pending appeal, first of all, I would disagree with Mr. Weddle
24 that there was a misstatement made before the Second Circuit.
25 I believe the statement that was in our brief indicated that

K7OHAHUC

1 there had been no improper shaping of Mr. Majidi's allocution,
2 which remains the government's view. We do not resist
3 additional fact-finding, as I said in our letter. So I think
4 it's, at best, premature at this point to revisit the bail
5 pending appeal. I think the government would consent to a stay
6 of the surrender date through the fact-finding, and then if our
7 position remains following the fact-finding that there was no
8 improper conduct, I think we would oppose any revisiting of the
9 bail pending appeal.

10 THE COURT: I guess my concern, Ms. Griswold, is I'm
11 not going to get involved today in making a decision as to
12 whether something was misleading or false, but it was
13 incomplete, and I don't think you're even disputing that the
14 information that was presented to me and to defense counsel
15 during the trial and thereafter was incomplete.

16 First of all, do you disagree with what I've just
17 said?

18 MS. GRISWOLD: Absolutely not, we agree 100 percent.
19 It was in complete.

20 THE COURT: All right. So my problem is -- and maybe
21 I'm just giving too much credit to the Second Circuit -- but it
22 seems to me the better thing is for them to have a complete
23 record, whatever it is. And I'm a little bit concerned about,
24 for example, your office submitting something in early August
25 that is incomplete, and the defendants and their counsel being

K7OHAHUC

1 perhaps hamstrung in what they would be submitting in reply
2 simply because I haven't been able to complete the fact-finding
3 that I'll talk about a little bit later today.

4 Now, perhaps the answer is that that's what we need to
5 talk about, my thoughts as to fact-finding, and then maybe the
6 parties can have a conversation. But without admitting a
7 defeat, Ms. Griswold, without admitting that there is a
8 problem, I think just the -- right now, today, the record is
9 incomplete, and that causes me concern.

10 MS. GRISWOLD: I agree. I'm sorry, your Honor.

11 THE COURT: That's OK. I'll let you finish your
12 thought, please.

13 MS. GRISWOLD: We would not oppose a motion to stay
14 the appeal so that everything can be before -- the entire
15 record, whatever that ends up being, can be before the circuit
16 at the same time. I was talking about order of operations in
17 terms of our view now of revisiting bail pending appeal versus
18 staying the surrender date.

19 THE COURT: All right. I'm thinking, and I'm thinking
20 out loud, that you might want to consider bail pending appeal,
21 but I'm going to stop thinking out loud and move from what were
22 the housekeeping issues to just the thoughts that I have right
23 now. I'm going to beg your indulgence while I present them to
24 you, and then I'm going to ask for your own thoughts.

25 I want to begin by saying that I've been reading a lot

K7OHAHUC

1 of this case, and we're now just over a year since the verdict
2 came in. What I've read has sparked a number of emotions in
3 me, and I've made a conscious effort this afternoon, and I've
4 made this effort -- only about an hour ago I made this
5 decision, that I was going to refrain from placing on the
6 record the entire explication of my emotions about this matter
7 and about my views as to what has happened. I'm doing so in
8 part because there's one of you on this call who knows full
9 well what happens when a judge rushes to a conclusion about
10 government conduct or lets other or extraneous facts influence
11 that decision. I'm not going to be that judge.

12 You're asking me, fairly you're asking me, to make
13 some very, very serious factual conclusions about the conduct
14 of the government, and I had intuited the motion practice that
15 is to come. I need to understand what happened, and the
16 biggest problem for me this afternoon is that I still don't
17 understand what happened. And the issue for me is that the
18 government's response in this matter has been iterative. I do
19 appreciate when folks quote my words back to me sometimes. I
20 think I used the "death by a thousand cuts" expression in a
21 glib sense, but what I mean now is that I'm growing weary of
22 getting partial answers, especially when partial answers modify
23 or, worse yet, contradict prior answers. I need, I believe
24 defense counsel and defendants need as well, a final answer, a
25 final response, a complete understanding of what happened. I

K7OHAHUC

1 feel, as the woman who's been reading all of this work and not
2 as the poor associates who've been writing all of this, that a
3 lot of time has been spent putting together arguments that
4 themselves are necessarily incomplete or simply tentative or
5 provisional because we don't know everything.

6 The government has committed to making production, to
7 again checking their records. I'm underscoring the term
8 "again," and they've said to me that they need two weeks from
9 my order. I'm telling the government, as plainly as I can,
10 take the time that you need and pick that amount of time, but
11 there can only be one more answer. I can't get, you know,
12 today we produced this; next week we'll produce this. We need
13 it all at once. We should have had it last year, but we need
14 it all at once. So I'm asking you to figure out -- and if you
15 tell me today, that's great, and if you need to convene with
16 each other about it and tell me today or Monday, that's great,
17 too -- I need to know what time you need to answer all of the
18 things that you have committed to answer.

19 At the moment I'm not, at the moment, requiring the
20 government to respond to the additional requests in
21 Mr. Tarlowe's letter. I want to say that I understand exactly
22 where they're coming from, and I'm taking very seriously,
23 Mr. Tarlowe, your argument to me that all of this information
24 that's coming to me is coming to light because of work that you
25 did, very thoughtful approaches that you took involving

K7OHAHUC

1 Rule 17(c) and FOIA and not, perhaps, where it should have come
2 from, proactive, required, traditional disclosure by the
3 government.

4 So what I'm saying is, Mr. Tarlowe, I still have your
5 list of requests, and I'm denying them without prejudice
6 because I want to see what gets produced in whatever time the
7 government takes to get it produced. I'm confident that you
8 and your team and Mr. Weddle and his team will respond when
9 they've reviewed these productions, and you'll tell me what it
10 is you believe has been missed.

11 But my concern is simply not only that the responses
12 may not be necessary or they may be overbroad. I'm not opining
13 on that. My issue, again, goes back to my initial point,
14 disliking or disfavoring the iterative nature of this. My
15 suspicion, Mr. Tarlowe, is when new documents are produced,
16 you're going to have additional requests, and I'd just like to
17 have them all at once. I don't want to be deciding now on an
18 iterative basis.

19 There's been some suggestion that once these documents
20 are produced, we're all good, and everything is resolved. I'm
21 telling you -- I don't want to tell you to a certainty, but I
22 want to tell you to a near certainty -- that there is going to
23 be a hearing in this matter, and the hearing, we're not just
24 talking oral argument. I have a very strong suspicion, at
25 least in my current way of thinking, that there will be witness

K7OHAHUC

1 testimony. For me, as much as I'm trying to make do with this,
2 this Zoom conference, this videoconferencing, I believe that
3 hearing needs to be in person because, for my own preference,
4 I'd much rather make credibility determinations in person and
5 not by some video means. Who is going to be at this hearing,
6 who is going to be conducting examinations, whether I will be
7 accepting sworn statements and to what degree they would
8 supplement or supplant the testimony, I will be determining
9 that in the future, but I just want a final answer as to what
10 other information is out there. But when I get it, there will
11 be a hearing, and right now, today, in July, I would be
12 concerned about asking all of you to come down here to the
13 court, but as the fall takes place and as we're a little bit
14 further along in the protections in the courthouse, I think I
15 want you here. Now, I'll listen to you if you can't for one
16 reason or another, but I think you can.

17 Ms. Griswold, returning to you, I'm getting or
18 understanding from some of the submissions that there either is
19 or will be a team of prosecutors who are not involved in the
20 trial that are looking over the emails. Is that correct?

21 MS. GRISWOLD: Yes, your Honor. We are at the stage
22 now of centrally pulling all of the materials, which includes
23 through our IT department further requires going to EOUSA
24 because of the time period for the communications. Some time
25 has passed. Once all of those materials are gathered, which we

K7OHAHUC

1 believe is going to be within the next week, members who are
2 not members of the trial team will be reviewing them. For
3 example, some of the searches that we have committed to conduct
4 are not key word focused. We're going to go through every
5 single email in this time period. So we have to have AUSAs
6 rather than paralegals or staff go through that.

7 But the short answer is, yes, AUSAs other than the
8 three of us will be going through the material, and that
9 process has started with a central collection of the materials
10 that need to be reviewed.

11 THE COURT: One of the things I noticed in looking at
12 some of your key words, especially the word "allocution," which
13 apparently gives some people difficulty, are you able to do
14 searches with roots of words rather than complete words?

15 MS. GRISWOLD: We have not asked that question. I
16 don't see why not, but I would need to confirm with the IT
17 folks about whether or not their capabilities would allow for
18 that.

19 THE COURT: I was just noticing, for example, one of
20 the suggested terms was Rule 11. I'm just wondering maybe it's
21 R11 or R.11 or FRCP 11. What I'm noticing and what concerns me
22 is that some of the excuses -- some of the explanations that
23 have been given to me are that, for example, we put in the word
24 "allocution" and actually a misspelling of the term was used.
25 I mean, that's an explanation. It's not necessarily something

K7OHAHUC

1 that I'm accepting at this point given the history in this
2 matter. My hope would be that you'd try and find even
3 misspellings to see if that worked out.

4 If I call these other attorneys a taint team, will you
5 take offense at that?

6 MS. GRISWOLD: No, your Honor.

7 THE COURT: OK. I don't know what else to call them.
8 A wall team? A seconds team? I don't know. In my prior life,
9 I would have called them a taint team.

10 There's a suggestion from defense counsel that if
11 anyone were to interface with the cooperating witness and/or
12 their counsel, it should be folks other than you all. Do you
13 agree?

14 MS. GRISWOLD: On this issue, yes. For example, we
15 received an email from one of -- from Mr. Dole's counsel asking
16 if we would consent to an adjournment of his sentencing because
17 Mr. Kehoe is in Florida. Our request would be that anything
18 related to the ongoing motions, we would not be involved in.

19 THE COURT: All right. So what I believe you're
20 saying is your interactions with -- you wouldn't have
21 interactions with the cooperators themselves. They would
22 simply be with their counsel, and that would be on the order of
23 adjournment, dates for sentencing, ministerial matters, nothing
24 substantive at this stage, correct?

25 MS. GRISWOLD: Correct.

K7OHAHUC

1 THE COURT: Ms. Griswold, it would be my
2 expectation -- and I think I don't want to have to order this,
3 but I will if you need me to -- there should be no sentencing
4 of Mr. Majidi, Mr. Dole, or Dinucci until this set of motions
5 is resolved. Are we in agreement on that?

6 MS. GRISWOLD: We are, your Honor.

7 THE COURT: All right. Mr. Tarlowe, I'll begin with
8 you. I'll just go in reverse order this time.

9 That's my proposal, and that doesn't end the issue,
10 but it addresses the concerns that I have right now and it
11 leaves open a path for going forward. May I hear from you on
12 that.

13 MR. TARLOWE: Yes, your Honor. I appreciate the Court
14 directing the government to take that initial step. A couple
15 of issues that I just wanted to raise. One, we think the
16 search terms that the government has proposed are not
17 sufficient, and we share the Court's frustration in the
18 iterative nature of this. I certainly don't want to be in a
19 position again where we're briefing issues based on an
20 incomplete record. My concern, for example, is they have
21 proposed search terms, I think three search terms: allocution,
22 plea, and Rule 11. It's not just misspellings that those terms
23 may fail to capture, but there may be emails where people are
24 talking about, for example, just talked to Mr. Rosenberg. He
25 says Amin is not going to say X or Y. So I think there may

K7OHAHUC

1 very well be communications that are relevant that would not be
2 captured by those search terms. So we would suggest --

3 THE COURT: One moment, please, sir. I thought I
4 understood as well that the government was proposing to look,
5 for example, at emails that were seven days before and seven
6 days after things and just go through all of the emails, which
7 might cover some of the issues that you're now raising. But I
8 presume you're now going to tell me that you have search terms
9 of your own to propose?

10 MR. TARLOWE: I don't. We're happy to propose them.
11 I do think that the government should review all of the emails,
12 all of the internal chats, all of the different modes of
13 communication. I don't think they should be limited by search
14 terms. If they are limited, the search terms need to be
15 broader to capture all documents related to this case, and that
16 would include, for example, the first and last names of each of
17 the cooperating witnesses, the first and last names of each of
18 the lawyers of the cooperating witnesses, all emails to or from
19 any of the lawyers for the cooperating witnesses. It's just
20 not sufficient to rely on those search terms.

21 THE COURT: All right. One moment, please.

22 Ms. Griswold, is it possible, and I think the answer
23 is yes, to run searches in the manner that Mr. Tarlowe just
24 most recently described?

25 MS. GRISWOLD: Yes, your Honor, and our proposal is

K7OHAHUC

1 to, without limitation by key word or recipient, look through
2 all emails for the -- with the focus on cooperator allocutions
3 for the seven-day time period before and the seven-day time
4 period after -- every single one of the emails for the members
5 of the trial team. So that would capture, I believe, not just
6 what is an allocution, what is a misspelling.

7 We want to get this right. We recognize that our
8 searches were wholly insufficient, and so if there are specific
9 additional search terms, we are happy to use them, but we're
10 not limiting ourselves based on search terms. We're looking at
11 the date of the plea. If Mr. Tarlowe's asking us to go out
12 another week on either side, but this is -- to look at every
13 single email that's on Amin Majidi, we're going to get into
14 witness prep, we're going to go into that second bucket of
15 requests that, my understanding from the Court at this point,
16 we're not getting into. So I think the --

17 THE COURT: One moment, please. My fear, and perhaps
18 Mr. Tarlowe's fear, is that there is something really
19 interesting on the eighth day. So I don't mind the week
20 before, the week after, and looking at all emails during that
21 period, I agree with that, but I still think you should run all
22 emails through first name, last name of the cooperating witness
23 and the lawyer, and even if that is a lot of stuff that you
24 don't think is necessary to be produced, I think they ought to
25 be looked at.

K7OHAHUC

1 MS. GRISWOLD: OK, your Honor, we will do that.

2 THE COURT: All right. Thank you.

3 Mr. Tarlowe, you may continue.

4 MR. TARLOWE: Yeah.

5 MR. WEDDLE: May I interrupt on this issue of search
6 terms, just very quickly?

7 THE COURT: Sure, Mr. Weddle. I promise I was going
8 to talk to you after I finished talking to Mr. Tarlowe.

9 MR. WEDDLE: I'll wait, then.

10 THE COURT: OK. Thank you.

11 Mr. Tarlowe.

12 MR. TARLOWE: Second request, Judge, is recognizing
13 that there will be, to use the Court's term, a taint team that
14 will be reviewing these documents, I just want to make sure
15 it's clear that this is not just a subject matter review. What
16 I mean by that is when the taint team is reviewing documents,
17 the objective should not be, is this document related to the
18 allocution or not? That, of course, should be part of the
19 inquiry, but the taint team should be familiar with the facts
20 of this case and the defenses so that if, in the course of that
21 review, they come across a document that is even arguably
22 *Giglio* or *Brady* but doesn't relate to the allocutions, that
23 those documents will be disclosed.

24 THE COURT: Mr. Tarlowe, it would seem to me that if
25 the members of the taint team reviewed Mr. Weddle's letter of

K7OHAHUC

1 the 19th of June and your letter to me of July 6, that they
2 would have an understanding of the issues that you now raise.
3 Do you agree?

4 MR. TARLOWE: I'm not sure, Judge, because it's
5 possible, for example, that in the review of all emails
6 referring to a cooperator's name, that there's a discussion of
7 something that a cooperator or his or her lawyer said that was
8 inconsistent with their trial testimony. That would be *Giglio*
9 but has nothing to do with the allocution. So I just want to
10 be sure that the prosecutors who are reviewing this material
11 have a sufficient understanding of the case and the nature of
12 the defenses independent of the allocution issues so that they
13 are in a position to spot potential *Brady* or *Giglio* that don't
14 relate to the allocutions.

15 THE COURT: Are you asking them as well to review your
16 closing arguments?

17 MR. TARLOWE: I think that would be a good idea.

18 THE COURT: Ms. Griswold, is that a possibility?

19 MS. GRISWOLD: Sure, your Honor. Of course.

20 THE COURT: OK. Mr. Tarlowe, yes.

21 MR. TARLOWE: Then the last thing on -- well, another
22 thing on the scope of the search, I heard the government say
23 that just a moment ago they would be reviewing all emails
24 without regard to search terms for a particular period of time,
25 but there are other modes of communication, including the

K7OHAHUC

1 internal chat system, which, I'll confess, I didn't know about
2 or just didn't remember from my time in the office. As the
3 Court may be aware, in another matter before Judge Nathan, the
4 government recently disclosed some significant communications
5 among the AUSAs that were recovered from the internal chat
6 system. So I'd like to make sure that that is also captured by
7 these searches.

8 THE COURT: I understood that from the written
9 submission, but Ms. Griswold will confirm.

10 MS. GRISWOLD: Yes, your Honor, we have chats, voice
11 mails, emails -- everything that we indicated in our submission
12 on July 16 is part of this review, and right now we're in the
13 stage of confirming what is there. We believe that at least
14 one member of the trial team's chats are completely backed up,
15 so we're in the process of pulling everything. But chats are
16 part of our review, and they will be reviewed consistent with
17 the representations that we made in our letter and following
18 from the additional guidance we get on this call.

19 THE COURT: All right. I guess I was understanding --
20 no, I think my question's been answered. Never mind. Thank
21 you.

22 Mr. Tarlowe, something else before I turn to
23 Mr. Weddle?

24 MR. TARLOWE: Yes, your Honor, just two more things.
25 One is -- and I raise this for the Court's consideration. I

K7OHAHUC

1 don't have a strong view on this. But when the Court described
2 earlier how it's time for answers for the full picture, I
3 understand that the Court has said this is only the next step
4 and that there likely will be additional steps, so this may be
5 premature. But I do have a concern that the documents are not
6 going to tell the entire story, and there are a number of
7 questions that we've laid out in our submissions that the
8 government is in a position, I would think, to answer. So I
9 wonder whether it may make sense, in connection with the
10 production, in addition to producing the documents and the
11 government being able to say these are all the documents, we're
12 done searching, that perhaps they can also provide an
13 explanation of what happened and answer some of the outstanding
14 questions.

15 THE COURT: I'm not going to do that at this time
16 because what I've been doing, and what I may stop doing at some
17 point, is I've been putting together my own list of questions
18 that I want answered, and whether they are answered in sworn
19 statements or in testimony is something that I'm currently
20 debating internally. But I haven't -- I accept your
21 proposition that production of the documents doesn't end the
22 inquiry. I'm just trying to figure out the best way to do it.
23 And to be candid with you, it's not until I have all of the
24 documents that I will know best what I want answered, and that
25 will be informed, I suspect, by letters of the type you've

K7OHAHUC

1 submitted to me outlining things that you believe are gaps or
2 inconsistencies. So I'm deferring, not denying, sir.

3 MR. TARLOWE: Thank you, Judge.

4 Then the last issue I wanted to address on this is I
5 understand the Court is not at this time inclined to direct the
6 government to conduct the broader searches that we've
7 requested. On that issue, Judge, my concern is that the issue
8 of the allocutions is a very narrow, specific, targeted issue,
9 and on that issue, the government -- I won't belabor the facts
10 which I know the Court is familiar with -- but the government
11 obviously did not produce that material before trial. There
12 were Rule 17 subpoenas and some incremental production. There
13 was an order from the Court to review all communications with
14 lawyers for witnesses. It wasn't limited to documents that
15 have the term "allocution." It was all emails with lawyers for
16 the witnesses. The Court certified they did that. We did a
17 FOIA request. It was an incremental production. Then there
18 were additional searches and more productions. And we're not
19 talking about a needle in a haystack. We got within the last
20 two weeks a draft Dinucci allocution that was emailed to the
21 government.

22 So my concern, Judge, is that on an issue that is very
23 narrow and targeted, the government repeatedly missed key
24 documents, notwithstanding court orders, Rule 17 subpoenas,
25 FOIA requests. So my concern is there are a host of other

K7OHAHUC

1 issues that came up where there was nothing more than the
2 government's representation that either something was not
3 *Giglio*, for example, the testimony of the agent before the
4 grand jury, or there were representations that there is no
5 *Giglio* within a certain category, that there is no *Giglio* about
6 discussions with Dinucci's -- sorry, with Nimberg's lawyer
7 about immunity. Those representations, we cannot have any
8 reasonable degree of confidence that those are right because
9 whether what has happened here was purely inadvertent or
10 whether it was intentional, either way the government's
11 representations about having complied with its disclosure
12 obligations, having conducted adequate searches have been wrong
13 over and over again.

14 So we are in a position where, obviously, the way --
15 we all know the way that *Brady* and *Giglio* disclosures normally
16 work, and the government gets to make its own determinations
17 about whether documents are subject to disclosure or not. In
18 this case, based on this record, it's clear that we just can't
19 rely on those representations. So we do believe that it is
20 appropriate and warranted at this stage for the government to
21 go back and review the entire file, which your Honor asked them
22 to do when this came up at trial, but to go back, look at the
23 shared drive, look at the entire file for any *Brady* or *Giglio*.
24 It is not enough to just take their representation that
25 something was not *Giglio* and not subject to disclosure.

K7OHAHUC

1 So we really would urge the Court to reconsider that
2 part of your decision today because we are entitled to know
3 what else is out there, and we and our client and, I think
4 fairly, the judge, your Honor, cannot possibly have any comfort
5 that we have all the *Brady* and *Giglio* in this case.

6 And related to that, I do want to just talk briefly
7 about this issue of not memorializing oral communications, but
8 I think it's relevant to what I just discussed. The government
9 has said there is nothing sinister, nefarious about having
10 in-person or oral communication. Obviously, that is the case.
11 Nobody disputes that. But the emails do quite clearly, in our
12 view, show that there was a deliberate effort taken to avoid
13 putting things in email in order to avoid having to disclose
14 it, and that is very troubling because the government's
15 disclosure obligation applies to communications, to facts. The
16 substance of the communication is what is subject to
17 disclosure, or not, but by asking somebody not to send an email
18 and to do it over the phone instead, that has no impact as a
19 legal matter on the disclosure obligation, but that appears to
20 be exactly what happened.

21 In connection with all three cooperators' allocutions,
22 there's no dispute that the government played some part in
23 shaping, and I don't use that word pejoratively, but
24 influencing the substance of the allocution. There's no --
25 there's nothing memorialized about any of those communications.

K7OHAHUC

1 They all were in person and over the phone, and I don't think
2 that's a coincidence. And the starkest example, and I imagine
3 this will be among the issues covered in the Court's
4 fact-finding, but the day before Majidi's plea, we have this
5 redline created by the government. There appears to be a
6 meeting of the AUSAs from 3 o'clock to 4 o'clock, and then
7 within minutes of that meeting concluding, I think the email is
8 at 4:03, Mr. Naftalis sends an email to Mr. Rosenberg saying,
9 "Can we speak at 4:30?" and the document is not transmitted.

10 Now, I work a lot with redlines. It's hard for me to
11 think of an example where an edited document is created and
12 then, rather than just emailing it and saying, perhaps let's
13 discuss, there's just a phone call in which the changes are
14 read orally. It's hard to understand why that happened, Judge.
15 So the reason that I'm raising this is because I think there
16 may very well be, outside of the allocution context, other oral
17 communications with lawyers for witnesses for which there is no
18 record. And the internal emails, the internal chats may be the
19 only way that we are able to discover what those communications
20 were. So I do think where the government has failed
21 repeatedly, whether inadvertent or not, to satisfy its
22 disclosure obligations it is appropriate for them to be
23 directed to go back and review the whole file for *Brady* or
24 *Giglio*.

25 THE COURT: All right. Ms. Griswold.

K7OHAHUC

1 MS. GRISWOLD: Your Honor, with respect to the
2 cooperator allocution and the issue that is raised at trial, we
3 acknowledge that our searches -- and it wasn't intentional, to
4 be clear -- our searches were not sufficient to identify when
5 you said to us: Go back to your office and see if there are
6 any more like this. Tell me how we got from point A to point
7 B. The work that we did to figure that out was not sufficient,
8 and we acknowledge that.

9 But to paint with a broad brush that we don't
10 understand what *Giglio* and *Brady* is and that we haven't made
11 significant disclosures in this case that demonstrate our
12 knowledge of what it is, I think, is unwarranted. We made
13 significant *Brady* and *Giglio* productions in this case that
14 reflected a careful review of our file. We disclosed, for
15 example, communications with counsel for witnesses, witnesses
16 that were called to the trial, at trial, or that were not, and
17 those were oral communications. For example, we had a
18 January 2019 letter in which we disclosed a memorialization of
19 a conversation we had with counsel for Mr. Noorali at AOC. We
20 were attuned as we did our investigation and as we made our
21 disclosures to obligations of that nature, meaning *Triumph*
22 *Capital*-type obligations, *Giglio* obligations.

23 So while we fully recognize and acknowledge the
24 mistakes that were made with respect to searching for the
25 cooperator allocutions and how we got from point A to point B,

K7OHAHUC

1 and we want to do the work to make sure that we give full
2 comfort to the parties and the Court about exactly what
3 happened there. We don't think that Mr. Tarlowe's points about
4 not having reviewed the rest of our file sufficiently well are
5 warranted.

6 THE COURT: But I believe what he's saying -- and it's
7 something I don't necessarily disagree with -- is that it's a
8 shame to find out a year after the verdict that this material,
9 which seems so obviously called for by the discussions we were
10 having, was not produced. I take Mr. Tarlowe's point that at
11 some point one loses confidence in the representations that are
12 made. I think my own view at the moment is, with respect to
13 the issue of oral communications, I again need to see what else
14 is out there before I can make a final decision on this. So
15 I'm keeping that particular door open. To Mr. Tarlowe's
16 broader issue about the government conducting another *Brady* or
17 *Giglio* search, again, I think I want to see what else comes to
18 me in this matter before making that determination. Thank you.

19 Mr. Weddle, I'm now turning to you, and I appreciate
20 your patience.

21 MR. WEDDLE: Thank you, your Honor, if I could just
22 have one second?

23 THE COURT: Of course. Take whatever time you need.

24 MR. WEDDLE: Of course I agree with all the points
25 made by Mr. Tarlowe, and I think, just not to beat a dead

K7OHAHUC

1 horse, because your Honor already spoke to the government about
2 the issue and indicated that you weren't going to rule on it
3 right now, but I think that all of these things are connected
4 together. And where you have indications of efforts to conduct
5 communications orally or in person such that there is no
6 memorialization about what happened, then going -- even doing
7 what Mr. Tarlowe says, which is they should go back and review
8 the entirety of the file, in whatever format, to make sure that
9 they've produced the *Giglio* and *Brady* that they're obligated to
10 produce, that comes in the context where some of that file,
11 including documents recently produced, shows that the file will
12 be incomplete. The file --

13 THE COURT: Sir, isn't that the tension in
14 Mr. Tarlowe's argument? Not to beat up on Mr. Tarlowe, of
15 course. But isn't there a tension in saying, have the
16 government review its *Brady* and *Giglio* productions, make sure
17 it got it right, when his other argument, his subsidiary
18 argument, perhaps his stronger one, is the government, if
19 they're not memorializing oral communications, as *Triumph*
20 *Capital* requires them to do, that review is not going to
21 produce anything else?

22 MR. WEDDLE: Well, your Honor, I would flip it around.
23 I think that there's a tension in the government's argument.

24 THE COURT: OK.

25 MR. WEDDLE: The government -- the concrete evidence

K7OHAHUC

1 has been that uncovered here through a FOIA request, that
2 should have been voluntarily turned over because of the
3 government's constitutional obligations, should have been
4 turned over because your Honor specifically ordered the
5 government to do it and told them how to do it, they said that
6 they did it that way, and they said they turned everything
7 over, and none of that was true, so now we have documents that
8 we otherwise wouldn't have had. So the government -- and we
9 also have documents that have this indication repeatedly of an
10 effort to avoid memorialization.

11 So for the government to say we don't have to search
12 everything, we just have to search on the topic area in which
13 it's been demonstrated that the representations were
14 diametrically opposed from the truth, that's the only area we
15 need to re-search, that is a tension, your Honor. And I think
16 that the difficulty is that the searches that they're offering
17 to do, if ordered by the Court, are searches that are much more
18 limited, and we're faced with a situation now, years after the
19 events in question and a year after the trial, where the
20 government says: Well, here's some documents. We're sorry we
21 didn't produce them. We're sorry that we didn't accurately
22 respond to your Honor's questions, but nobody remembers
23 anything else about it, and it must have happened in good
24 faith.

25 There are routinely fact-finding methods that courts

K7OHAHUC

1 use to fill in the gaps when people claim a failure of
2 recollection. Just to take a very small example, we asked for
3 all documents that reflect oral communications, including phone
4 records. The government puts phone records in as evidence in
5 almost every trial to indicate what happened and to fill in the
6 gaps and complete the picture of what the communications are.
7 How many phone calls were there between AUSAs on the government
8 team and counsel for Mr. Majidi on October 30 and October 31?
9 Maybe the answer in the phone records is zero. That would tell
10 us something. Maybe the answer in the phone records is 20.
11 That would tell us something. But the government's position is
12 because the records don't show the substance, they shouldn't
13 even search them.

14 The problem is that the searches that they're offering
15 to do are relying entirely for satisfaction of their
16 obligations on the contents of the paper record in a limited
17 topic area where it's already been demonstrated that the
18 representations made were not accurate. So that seems to be in
19 strong tension with the government's affirmative obligation to
20 produce these materials.

21 I just wanted to make a couple other points, your
22 Honor. There was a mention of *Triumph Capital*, and of course,
23 *Triumph Capital* was the case that was raised by your Honor at
24 the beginning of this dispute which was in the midst of trial.
25 I think *Triumph Capital* is relevant but is a little bit of the

K7OHAHUC

1 wrong way to analyze the issue completely, because *Triumph*
2 *Capital* has to do with when is a statement an inconsistent
3 statement of a witness even if not made personally by the
4 witness?

5 There's a broader point here that we've raised, that
6 Mr. Ruzumna raised during trial and in the application that has
7 been appealed and the Court's order that was most directly
8 impacted by this allocution issue. We -- the defense, we
9 submit, would have wanted to present evidence, both through
10 cross-examination of cooperators and otherwise, to show that
11 cooperators or witnesses were willing to adopt language or
12 ideas propounded to them by the government. They were
13 malleable, OK? That is *Giglio* material, for sure. It's
14 probably also easily *Brady* material.

15 The government in saying it's OK to have these
16 communications. And to talk about *Triumph Capital* is missing
17 the *Giglio* point. When they had a communication, when a
18 prosecutor had a communication with a cooperator's lawyer and
19 said, in words or substance or by handing him a printed out
20 clean copy of an allocution text to read, they should have
21 memorialized that and disclosed it. They should have said:
22 You know, the cooperator was going to say X. We intervened in
23 the following way, and the cooperator said Y.

24 The government -- so this is just a very stark
25 example. They should have memorialized that. There's lots of

K7OHAHUC

1 ways to memorialize it. They could have written a letter to
2 describe oral communications that took place at 4:30 on that
3 afternoon. They could have described the importance of this
4 issue that caused the prosecutors to convene a team meeting to
5 discuss the proposed allocution. They could have written that
6 into a letter and disclosed it to the defense. They could have
7 conducted all these communications in writing and disclosed the
8 writings to the defense, but they did neither. So to say we're
9 going to search three search terms, which we know fail to
10 capture everything that is required and that we're only going
11 to search this very narrow issue of shaping allocutions, falls
12 flat or falls short of the government's affirmative *Giglio* and
13 *Brady* obligations.

14 And just to give a quick related example, the
15 government sent a letter to the Court in the context of
16 apologizing for misrepresentations, and the government produced
17 the allocution written by Mr. Naftalis and read nearly verbatim
18 into the record by Majidi. They produced it on, I think it
19 was, June 19. Should have been produced before trial. Should
20 have been produced, you know, well before Second Circuit
21 arguments on bail pending appeal, which was after the FOIA
22 request was delivered to the Southern District of New York.
23 Should have been produced in March. Should have been produced
24 lots of other times. And in that letter apologizing for the
25 mistake, the government said that the changes were completely

K7OHAHUC

1 consistent with the 3500 material. A statement like that, your
2 Honor, shows a callous disregard for the resources and rights
3 of the defense, because the 47 pieces of 3500 material for
4 Majidi, many of them are handwritten, someone on the defense
5 side has to read them, me, and see, is that accurate? Are they
6 completely consistent? And as we set forth in the letter of
7 July 7, they are absolutely not completely consistent.

8 Your Honor, I don't want to repeat your Honor's use of
9 a potentially glib phrase that came from way back when during
10 trial, but the number of statements that the defense and the
11 Court has to chase down and the time that's required to do
12 that, I think, is very problematic and warrants, certainly,
13 relief and I think it may be ultimate relief, your Honor.

14 And I don't say that lightly. Your Honor referenced
15 at the beginning of this case an experience that I was
16 personally involved in as a prosecutor in which I was singled
17 out -- not singled out. I, among other people, was
18 specifically mentioned as having engaged in wrongdoing by a
19 judge. It's not pleasant. I understand how bad that can be
20 for a prosecutor who's trying hard, but it's not clear to me
21 that the government understands how bad this can be for
22 defendants and for the Court. The Court took the time to
23 engage in an extensive factual inquiry regarding this
24 particular issue. The Court took the time to tell the
25 government how to make sure that they were complying with their

K7OHAHUC

1 obligations, namely, by reviewing their communications with
2 counsel. The government took time to discuss this and get
3 representations from defense counsel, and the Court issued a
4 ruling specifically based on those facts, conducted a trial,
5 the defense conducted a trial without a line of argument and
6 cross-examination and evidence that we submit we should have
7 had. Then we litigated bail and appeal in these very issues,
8 both before your Honor and in the Second Circuit, wrote an
9 appeal brief. So just from my own perspective, personal
10 perspective -- and I do this as a job, so it pales in
11 comparison to the perspective of a defendant like Mr. Shor,
12 right -- my law firm has spent more than 700 hours as appellate
13 counsel on this matter. Virtually all of that has to be
14 redone, and it has to be redone because of the government's
15 actions. Your Honor conducted, what, a six-week trial with
16 jurors, witnesses, counsel, all those people. I submit that
17 that's going to have to be redone unless other relief is
18 granted. The same thing for Mr. Ahuja's counsel. He had to
19 file a FOIA request to get documents that clearly should have
20 been given to him.

21 And just to circle back to the very beginning, your
22 Honor, and I don't want to make this too much of an argument
23 about the merits, but I do think when we start talking about
24 search terms and can we add this search term and this search
25 term or should it just be allocutions or should it also relate

K7OHAHUC

1 to proffer statements as well, which is one of the requests
2 made in the July 6 letter in which the government is expressly
3 avoiding conducting a search on that, my review of the proffer
4 statements in response to their statement that they were
5 completely consistent with the changes to the allocution
6 drafted by the government, my review shows that there are areas
7 where they're consistent; there are many areas where they're
8 not consistent; there are many areas where they're ambiguous.
9 The areas where they're consistent speak to me of
10 cross-examination in a conference room by prosecutors and
11 agents. That is, you see date range and then you see later in
12 the same 3500 material the witness purportedly says: Yeah, it
13 is possible that it was in 2014. That looks to me like an
14 agent or a prosecutor saying: Hey, you said it was 2015.
15 Don't you think it was possible it was 2014? And the witness
16 said yes. That statement --

17 THE COURT: Mr. Weddle, Mr. Weddle, I'm stopping you.
18 Don't speculate. We're not at the point of speculating.

19 MR. WEDDLE: My point, your Honor, is that statement,
20 that activity, if it took place, is of the same character as
21 writing the allocution because it's the same *Giglio* theory,
22 which is we wanted to argue that the witnesses were malleable
23 and they would say what the government indicated they should
24 say or that they personally designed they should say to please
25 the government. So the searches that they're offering or

K7OHAHUC

1 proposing, I think, are too small.

2 And then to just come full circle, when I started to
3 talk about the results of these mistakes, if they are mistakes,
4 falls heavily on both the Court and the defendants. I admit it
5 falls heavily on the government, too, to have to conduct a
6 review like this, but to circle back to, you know, we talked a
7 little bit about a stay of the surrender date and the
8 government's position was, well, we would consent to adjourning
9 a stay of the surrender date until the fact-finding is
10 complete. There is an extraordinary psychic cost, your Honor,
11 for a defendant to prepare to surrender to jail, to prison.
12 This issue has not caused that to --

13 THE COURT: One moment, please. I lost Mr. Shore.
14 He's coming -- he's back now. Thank you. I did not want to
15 lose him in this conference.

16 Thank you, Mr. Weddle.

17 MR. WEDDLE: Just to give your Honor an example,
18 Mr. Shor asked me to apologize on his behalf. He doesn't have
19 a suit coat to wear today. He packed his dress clothes based
20 on the last surrender date, which was adjourned. So I don't
21 think that short-term adjournments ameliorate the heavy weight
22 that he has to carry, and he has to carry it now because the
23 government failed to produce documents that they should have
24 found and produced and made disclosures they should have made
25 well prior to trial.

K7OHAHUC

1 THE COURT: Well, I don't want to push back on that,
2 Mr. Weddle, because I don't want to minimize the emotional
3 turmoil of preparing to surrender, which is something you and
4 I, we can talk about, we can feel about, but we have no
5 personal experience on the issue.

6 I guess I just turn to the point of I'm trying to
7 figure out what is the best way of giving me and you and your
8 clients the opportunity to get the information and make best
9 arguments from that information. So I'm not interested in
10 tormenting Mr. Shor or Mr. Ahuja by having a series of
11 adjournments of the surrender date, but I also don't want to be
12 rushed in the investigation that I intend to do and in the work
13 that I intend to do, which is why I was suggesting an
14 adjournment of the surrender date until I decide the motions
15 you have yet to file.

16 MR. WEDDLE: And that is, obviously, much preferable
17 your Honor. I know that we're not deciding the issue now, but
18 since there were multiple proposals that had been said back and
19 forth and because my client had asked me to apologize on his
20 behalf in this respect, I did want to mention it. And I think
21 that the idea that I had at the beginning, which is bail
22 pending appeal, is obviously a broader scope than your Honor's
23 proposal too.

24 THE COURT: I think that is something that would
25 benefit from discussion with you, with Mr. Ahuja's counsel,

K7OHAHUC

1 with the government and, if necessary, with me. But my own
2 view is that if I don't have a complete record, the circuit
3 doesn't have a complete record, and right now we don't. But I
4 understand.

5 With respect to your larger points about proffer
6 statements and being of the same piece, I would hope that you
7 would accept my representation, and I hope Mr. Tarlowe would as
8 well, that I am still considering this. My issue is that I
9 need to see -- I may not need to get to the proffer statement.

10 One moment. Who's speaking? There we go. That
11 stopped. OK. That was delightful, and now that's ended. All
12 right.

13 So the issue is I may see these documents and I may
14 have a reaction that doesn't require you to get into proffer
15 statements. I may see these documents and have a reaction that
16 calls for the proffer statements and other things. What I
17 hoped I had communicated at the beginning and what I will
18 therefore return to now is I just wish I understood the issue,
19 and today I don't and at some point I will, even if that means
20 having to piece together and interpolate things myself. But
21 I've read and considered very seriously and I've considered
22 very seriously today what you're saying, and the fact that I
23 deny it today doesn't mean I deny it for all time. I just need
24 to see more.

25 But I appreciate you recapitulating the arguments that

K7OHAHUC

1 you and Mr. Ahuja's counsel have made, and I take absolutely --
2 you all should know me enough by now that I take no offense at
3 Mr. Shor's lack of suit jacket. Mr. Shor was always -- during
4 the trial he was always very agreeable, very cordial, very
5 proper, and I take no offense at all. Actually, Mr. Weddle, I
6 appreciate what you said to me, which is the reasons why it's
7 taking place over the reasons that you articulated.

8 Mr. Weddle, I don't wish to cut you off, but I think I
9 understand your arguments. Is there more you wish to tell me?

10 MR. WEDDLE: No, your Honor. Thank you.

11 THE COURT: All right. Thank you.

12 Ms. Griswold, I sort of said my piece, and so I think
13 the parties understand it. And to the extent that that piece
14 has been modified slightly by my conversations with defense
15 counsel as you now understand it, if there's something you want
16 to tell me, you are certainly invited to do so. If you're just
17 going to recapitulate what's in the written submissions, I
18 commit to you that I've read them and all the attachments to
19 them, and I think the real issue is you speaking with your
20 colleagues about when I can get, when defense counsel can
21 get -- of course, they need it perhaps as much, perhaps more,
22 than I. I was going to say as much as I do -- when I can get
23 these document, when I can have the final tally of the
24 documents that are responsive. So, please, you can either tell
25 me now or tell me that you'll let me know by Monday.

K7OHAHUC

1 MS. GRISWOLD: Your Honor, can we have a month from
2 today? The two-week period we were on track to meet, but both
3 because we expanded on this call, to a certain degree, what
4 we're going to be going through and because we take your
5 Honor's direction that there's one shot, that we'd like to ask
6 for a month from today as opposed to the two weeks.

7 THE COURT: That's fine. Barring natural disaster,
8 you will not get beyond the month, but, yes, you will have the
9 month. Thank you.

10 All right. Ms. Griswold, anything else?

11 MS. GRISWOLD: No, your Honor. Thank you.

12 THE COURT: OK. From my perspective, I've said what I
13 wanted to say. I heard what I wanted to hear. These are
14 strange circumstances having these proceedings by video. Were
15 we in the same room, you would understand the seriousness with
16 which I'm approaching this. I hope I'm able to communicate
17 that seriousness through this conversation. If not, then I can
18 simply tell you in my words that everything here, everything
19 that is said, causes me concern.

20 With that, there's nothing else I wish to address in
21 this proceeding.

22 Mr. Tarlowe, is there anything else?

23 MR. TARLOWE: No, your Honor.

24 THE COURT: Thank you.

25 Mr. Finzi I'm happy to have you on the proceedings.

K7OHAHUC

1 Is there anything you want to add?

2 MR. FINZI: No, your Honor. Thank you.

3 THE COURT: Thank you.

4 Mr. Weddle, anything else?

5 MR. WEDDLE: No, your Honor. Thank you.

6 THE COURT: All right. So the natural question is
7 what happens next? In one month we're getting this production.
8 I'm imagining within a week or two of that one month I'm
9 getting something from defense counsel. Please, again, I want
10 your best. If that means it takes a couple of weeks, that's
11 fine. If you'd like to write to me when you receive the
12 production and give me a sense of the time that you need,
13 that's fine. We'll be reading these productions together, and
14 then with your thoughts and with my review of the production,
15 I'll be putting out further orders and having further
16 conferences of the type to further discuss the specifics of the
17 hearing I would like to have.

18 With that, for the month that I will not see you, I
19 wish you all well. I wish you safety and good health, and I
20 thank you again for participating on this call on a Friday
21 afternoon.

22 We're adjourned. Thank you.

23 (Adjourned)
24
25